Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–2155 OF 2010
RAMLY ALI, ABDUL WAHAB PATAIL AND ZAHARAH IBRAHIM JJCA
17 JANUARY 2012

Civil Procedure — Appeal — Facts, finding of — Interference by appellate court — Principles applied — Whether appellant had succeeded in demonstrating that trial judge had erred and that error had led to injustice

The plaintiff/respondent ('the respondent') brought an action against the defendant/appellant ('the appellant') for construction work done under a subcontract. The respondent claimed that it had completed the construction work and the variation work, as ordered by the appellant, and thus by way of this action sought to claim the total value of the work it had completed under the subcontract and the subsequent variation work. The appellant counterclaimed. The appellant claimed that under the terms of the subcontract it was entitled to set-off off a certain sum of money from the total value of the works done by the respondent under the subcontract. At the trial the appellant made an oral application to amend the amount of special damages for defects from RM72,380 to RM302,313.90 as the sum expended to remedy defects but the trial judge refused to allow the amendment to the appellant's pleadings on the basis that the pleadings were deemed closed. After a full trial, the High Court found in favour of the respondent and dismissed the appellant's counterclaim. The appellant appealed against that decision and raised 13 grounds of appeal to show that the trial judge had erred in his findings. The appellant claimed that the trial judge had erred, inter alia, in holding that the respondent had proved its claim for the work done under the contract and subsequent variation work; in failing to take into account the evidence of the value of the rectification works as set out in the counterclaim; and in dismissing the appellant's oral application to amend the counterclaim. It was clear that the issues, which the parties had agreed upon to be determined, were issues of fact. Thus, notwithstanding the 13 grounds of appeal, the sole issue for determination in this appeal was whether the appellant had succeeded in demonstrating that the trial judge had erred and that the error had led to an injustice.

Held, allowing the appeal with costs fixed at RM30,000:

(1) Although an appellate court would be slow to interfere with findings of fact, it would intervene to correct an injustice, which was shown to have

occurred in the trial court. The present case was a case that required the exercise of the appellate jurisdiction to intervene to rectify an injustice (see paras 4–5, 8 & 26).

(2) Based on the evidence, it was clear that the trial judge had failed to take into account the fact as to whether the variation works carried out by the respondent were authorised, and if so the value of those works. This court found that the respondent, a contractor, could not be innocent of the fact that the scope of variation and better still the price should be determined and that the onus was upon him to prove that claim. As such, the respondent could not simply submit a claim for variation works done, state a price and insist on payment of that sum (see paras 13 & 15).

(3) From the record before this court it was clear that the issues set out to be tried were broad and general questions that remained in dispute. In the circumstances, it would be an injustice to the respondent to disallow its claim just as it would be an injustice to the appellant to allow its claim against it without addressing each and every disputed item of the claim. Thus, the disputed facts ought to be retried so that the parties could be satisfied that justice was done (see paras 16–17).

(4) The grounds of decision and notes of proceedings show that the trial judge's decision to refuse the appellant to amend its pleadings was not a fully considered decision. An objection on the ground of delay alone was insufficient. If the amendment was bona fide, in that it was necessary and would not delay the matter, then it should be allowed (see paras 22–23).

[Bahasa Malaysia summary

Plaintif/responden ('responden') mengambil tindakan terhadap defendan/perayu ('perayu') untuk kerja-kerja pembinaan yang dibuat di bawah subkontrak. Responden mendakwa bahawa ia telah menyelesaikan kerja-kerja pembinaan dan kerja-kerja perubahan, sebagaimana yang diperintahkan oleh perayu, dan dengan itu melalui tindakan ini bertujuan untuk menuntut jumlah nilai kerja-kerja yang telah diselesaikan di bawah subkontrak dan kerja-kerja perubahan berikutnya. Perayu membuat tuntutan balas. Perayu menghujahkan bahawa di bawah syarat-syarat subkontrak, ia berhak menolak kira jumlah bayaran wang tertentu daripada jumlah nilai kerja-kerja yang dibuat oleh responden di bawah subkontrak. Ketika perbicaraan tersebut, perayu membuat permohonan lisan untuk meminda jumlah ganti rugi khas bagi kecacatan daripada RM72,380 kepada RM302,313,90 sebagai jumlah yang dibelanjakan untuk memulihkan kecacatan tetapi hakim bicara enggan untuk membenarkan pindaan dibuat ke atas pliding perayu atas dasar bahawa, pliding dianggap telah ditutup. Selepas perbicaraan penuh, Mahkamah Tinggi memutuskan berpihak kepada responden dan menolak tuntutan balas perayu. Perayu merayu terhadap keputusan itu dan membangkitkan 13 alasan rayuan untuk menunjukkan bahawa hakim bicara telah terkhilaf dalam

keputusannya. Perayu mendakwa bahawa hakim bicara telah terkhilaf, antara lain, dalam memutuskan bahawa responden telah membuktikan tuntutan bagi kerja yang dilakukan di bawah kontrak dan kerja perubahan berikutnya; dalam kegagalannya untuk mengambil kira bukti nilai kerja-kerja pemulihan seperti yang dinyatakan dalam tuntutan balas tersebut dan menolak permohonan lisan perayu untuk meminda tuntutan balas tersebut. Adalah jelas bahawa isu-isu, yang pihak-pihak telah bersetuju untuk diputuskan, adalah isu-isu fakta. Oleh itu, apa jua 13 alasan rayuan tersebut, isu tunggal untuk diputuskan dalam rayuan ini adalah sama ada perayu telah berjaya menunjukkan bahawa hakim bicara telah terkhilaf dan bahawa khilaf tersebut telah membawa kepada ketidakadilan.

Diputuskan, membenarkan rayuan dengan kos yang ditetapkan pada RM30,000:

(1) Walaupun Mahkamah Rayuan lewat dalam campur tangan dpatan fakta, ia adalah campur tangan untuk membetulkan ketidakadilan, yang ditunjukkan telah berlaku dalam mahkamah bicara. Kes ini adalah kes yang mengkehendaki penggunaan bidang kuasa rayuan untuk campur tangan bagi memperbaiki ketidakadilan (lihat perenggan 4–5, 8 & 26).

(2) Berdasarkan kepada keterangan, adalah jelas bahawa hakim bicara telah gagal mengambil kira fakta sama ada kerja-kerja pengubahsuaian yang dijalankan oleh responden telah diluluskan, dan jika demikian, nilai kerja-kerja mereka. Mahkamah ini mendapati bahawa responden, seorang kontraktor, tidak boleh tidak bersalah atas fakta skop variasi dan apatah lagi dengan harga yang perlu ditentukan dan bahawa tanggungjawab adalah di atasnya untuk membuktikan dakwaannya tersebut. Oleh itu, responden tidak boleh hanya mengemukakan tuntutan untuk kerja-kerja pengubahsuaian yang dilakukan, menyatakan harga dan meminta pembayaran jumlah wang tersebut (lihat perenggan 13 & 15).

(3) Berdasarkan rekod di hadapan mahkamah ini, adalah jelas bahawa isu-isu yang dibentangkan untuk dibicarakan adalah soalan-soalan luas dan umum yang masih dalam pertikaian. Dalam keadaan ini, akan menjadi satu ketidakadilan kepada responden untuk tidak membenarkan tuntutan hanya kerana ia akan menjadi satu ketidakadilan kepada perayu untuk membenarkan tuntutan terhadapnya tanpa menangani setiap perkara yang dipertikaikan tuntutan. Oleh itu, fakta-fakta yang dipertikaikan sepatutnya dibicarakan semula supaya pihak-pihak berpuas hati bahawa keadilan telah dijalankan (lihat perenggan 16–17).

(4) Alasan-alasan keputusan dan nota prosiding menunjukkan bahawa keputusan hakim bicara untuk menolak perayu daripada meminda pliding bukanlah suatu keputusan yang telah dipertimbangkan sepenuhnya. Suatu bantahan atas alasan kelewatan sahaja tidak

mencukupi. Jika pindaan tersebut adalah bona fide, bahawa ia adalah perlu dan tidak akan melambatkan perkara tersebut, maka ia harus dibenarkan (lihat perenggan 22–23).]

Notes

For cases on fact, finding of, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 996–1117.

Cases referred to

Eurymedon, The (1942) 73 Ll L Rep 217, HL (refd)
Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223; [1997] 1 CLJ 396, CA (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Medicon Plastic Industries Sdn Bhd v Syarikat Cosa Sdn Bhd [1995] 2 MLJ 257; [1995] 3 CLJ 171, CA (refd)
Onassis & Anor v Vergottis [1968] 2 Lloyds Rep 403, HL (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395; [1996] 4 CLJ 545, CA (refd)
Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd & Ors [1983] 1 MLJ 213; [1983] 1 CLJ 191, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 53
Rules of the Court of Appeal 1994 rr 5, 18

Bastian Vendargon (Devan & Associates) for the appellant/defendant.
Felix Dorairaj (Dorairaj Low & Teh) for the respondent/plaintiff.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The plaintiff, Conlay Construction Sdn Bhd claimed payment for construction work done under a subcontract. The defendant, Perembun (M) Sdn Bhd counterclaimed. After a full trial, the High Court found in favour of the plaintiff and dismissed the defendant's counterclaim. The defendant appealed to this court:

> … terhadap keseluruhan keputusan tersebut di mana diputuskan bahawa penghakiman dimasukkan terhadap Defendan untuk jumlah sebanyak RM753,769.61 dan RM374,000.00 bersama-sama faedah dan kos sebanyak RM45,000.00.

[2] Having heard the parties, the defendant's appeal was allowed, the order of the High Court was set aside and costs was fixed at RM30,000 here and below.

[3] At the trial, the parties had agreed upon the issues to be determined. The issues were issues of fact. The learned judge of the High Court set out the issues at para 7 of her grounds of decision. The first question before us is, therefore, about an appellate court's approach to findings of fact arrived at by a trial court to which the law entrusts the primary task of evaluation of the evidence.

[4] Both parties began their submissions with the clear understanding that an appellate will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial judge. They cited this court in *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA). This general principle was adopted by this court in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA and other cases. It is clear it is a general principle and that there are exceptions when appellate intervention is necessary to ensure justice is done. In the cases regularly cited, the terms 'intervene' and 'interfere' are used interchangeably. A more precise use of terminology would remove much unnecessary confusion and argument. It is more precise to say that an appellate court will intervene to correct an injustice when it is shown to have occurred in the trial court, but it would be an interference otherwise.

[5] The following from the dissenting speech of Lord Pearce in *Onassis & Anor v Vergottis* [1968] 2 Lloyds Rep 403, 430 was quoted in *Sivalingam* as containing a valuable reminder:

> The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or a miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of the wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of their respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant may in the end fail to secure a judgment in his favour: But the fact that the right party seems to have succeeded in the court below will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases. Such matters are questions of degree.

[6] This court in *Sivalingam* quoted Lord Atkin's dissent in *'The Eurymedon'* (1942) 73 Ll L Rep 217 where he said:

> … It is, in my opinion, a mistake to suppose that the decision of this house in the *Hontestroom,* [1927] AC 37, laid down as a proposition of law that an appellate tribunal must in all cases accept the findings of a trial judge where he purports to base these on his belief in the credibility of particular witnesses. No court can so restrict its statutory jurisdiction; and in these days, where civil cases involving important questions of credit and reputation and even of liberty are determined by a judge alone, it is of great importance that the full jurisdiction should be maintained.

[7] There is almost no limit to the range within which cases in court may vary. At one end there are cases that involve solely questions of law, and no facts are disputed. On the other there are cases that involve no law but all the facts are disputed. Within these cases there may be cases with disputed facts that involve solely interpretation and inferences leading to a conclusion on a finding on the disputed fact, and there may be other cases with disputed facts that involve solely oral evidence and the finding depends entirely upon an assessment of the credibility of witnesses who testified and were tested before the trial judge.

[8] Hence, the proper approach is that if (a) it is shown that the judgment cannot be explained or justified by the special advantage enjoyed by the trial judge by reason of having seen and heard the witnesses testify and being tested before him, and (b) an injustice is demonstrated to have been occasioned by any error by the trial judge, for example:

(a) the judgment is based upon a wrong premise of fact or of law;

(b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;

(c) the trial judge has completely overlooked the inherent probabilities of the case;

(d) that the course or events affirmed by the trial judge could not have occurred;

(e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or

(f) the trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion;

an appellate court will intervene to rectify that error so that injustice is not occasioned.

[9] Thus, an appellate court cannot simply substitute the decision of the trial court with one of its own on any ground at will. Section 53 of the Courts of Judicature Act 1964 provides that except by leave of the Court of Appeal, an appellant is limited to the grounds set out in his memorandum of appeal. Hence, although r 5 of the Rules of the Court of Appeal 1994 provides that appeals to the Court of Appeal shall be by way of re-hearing, that is limited by r 18:

Rule 18. Memorandum of appeal

(1) The appellant shall prepare a memorandum of appeal setting forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided; such grounds to be numbered consecutively.

(2) The appellant shall not without the leave of the Court put forward any other ground of objection, but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.

[10] The memorandum of appeal must be sufficiently specific to give the respondent a fair opportunity, considering the nature of the ground raised, to address the point, without, on the date of hearing, having to request an adjournment to address it properly. General and vague grounds may be dismissed on objection on that ground.

[11] In the instant appeal, notwithstanding that 13 grounds of appeal were set out in the memorandum of appeal, both parties were able to address adequately the material issues of concern. The germane question before us is whether the appellant in this case has succeeded to demonstrate where the learned judge had erred and that the error had led to an injustice.

GROUNDS 1, 2 AND 3

[12] Grounds 1, 2 and 3 are general grounds that are introductory in nature and cannot and need not be dealt with individually.

GROUNDS 4, 5 AND 6

[13] Grounds 4, 5 and 6 are that the learned judge erred in:

(a) holding the plaintiff had proved their claim for the work they had done when there is no clear evidence;

(b) holding the total claim for variation work have to be paid when the plaintiff failed to prove the work that was done; and

(c) failing to take into account evidence in cross-examination of the plaintiff's witnesses not being able to show that the variation work had been completed.

[14] It was submitted for the respondent before us that the evidence as to value of work done was addressed at lines 5–10 in para 11 of the grounds of decision. Likewise, the evidence as to variation works was dealt with in para12 between 11–15 of the grounds of decision.

[15] The learned judge had relied upon as fact that, based upon the

appellant's letter of 8 October 2001, the appellant objected to only four items of the variation orders out of the detailed list in set out in C/484–611. This assumption led her to the conclusion since the other variation orders were not objected to, they were accepted by the appellant. On examination we find that letter was only in answer sent in relation to specific claims made by letter. This led the learned judge to fail to take into account that the appellant had never confirmed any of the total of 22 variations. The learned judge therefore failed to address the question of proof of whether the variation works were authorised, and if so the value of the work done. It is also true that the respondent's witnesses themselves were of little assistance when cross-examined. We agree that the respondent as plaintiff cannot simply submit a claim for variation works done, state a price, and insist on payment of that sum. The plaintiffs cannot be unaware that the onus is upon them to prove their claim. See *Medicon Plastic Industries Sdn Bhd v Syarikat Cosa Sdn Bhd* [1995] 2 MLJ 257; [1995] 3 CLJ 171 (CA). The respondent, being in business as a contractor, cannot be innocent of the fact that the scope of variation and better still the price must be determined as it is a claim over and above the agreed contract.

[16] At the trial, four issues were set out to be tried:

(a) what is the total value of the work done by the plaintiff under the subcontract and consequently that is the amount due (if any) from the defendant to the plaintiff in respect of work done under the subcontract;

(b) what (if any) is the total amount the defendant is entitled under the terms of the subcontract to deduct or set-off from the total value of works done by the plaintiff under the subcontract;

(c) consequent to the foregoing was the defendant entitled to issue a demand on the performance bond and receive payment thereon in the sum of RM374,000; and

(d) is the plaintiff, after taking account of (a) and (b) above entitled to a full refund of RM374,000 or part thereof inclusive of interest.

[17] These are very broad and general questions that might be expected to come from a client but not from learned counsel at the commencement of a trial. If the pleadings were analysed, the disputed facts would be identified, and counsel ought before trial to proceed to discovery and interrogatory to check and verify the evidence relied upon. Much blind disagreement becomes clarified and dispute would evaporate. Where parties continue to disagree and dispute does not evaporate, the process serves to gather the evidence relied upon by the parties, and help to place the evidence before the trial judge. From the record before us, this did not happen and we find it to be as much an injustice to the respondent to disallow its claim as it is to the appellant to allow

the claim against it without addressing each and every disputed item of the claim. We are of the view the disputed facts ought to be retried so that parties are satisfied justice is done.

GROUND 7

[18] Ground 7 is that the learned judge erred in holding that estoppel applied in this case. since it was not addressed by the appellant specifically, we need not address it.

GROUNDS 8 AND 10

[19] Grounds 8 and 10 states that the learned judge had erred in failing to take into account the evidence of the value of rectification works set out in the counterclaim.

[20] The findings of the learned judge were addressed at paras 23–25 of the grounds of decision. The onus of proof lies on the appellant. We make the same observations as for grounds 4, 5 and 6 above.

GROUND 9

[21] Ground 9 is that the learned judge erred when the oral application by the appellant to amend the counterclaim was dismissed. The appellant had made an oral application to amend the amount of the special damages for defects from RM72,380–RM302,313.90 as the sum expended in order to remedy defects. This application was opposed by the plaintiff. The learned judge refused to allow the amendment on the basis that the pleadings were deemed closed in 2002. It was submitted for the respondent the learned judge had dealt with the oral application at paras 8–9 of the grounds of decision.

[22] That the court will assist the vigilant and not the indolent is a principle of equity. It is one of the considerations to be taken into account whether to allow an application or not. Hence, a court may refuse relief to an indolent litigant (see *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223; [1997] 1 CLJ 396 (CA)). But it is a discretion to be exercised judicially. The authority as to amendments of pleadings is *Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd & Ors* [1983] 1 MLJ 213; [1983] 1 CLJ 191. A judicial exercise of the discretion demands a consideration of all the circumstances. The decision is primarily founded upon a consideration of the interest of justice. If is bona fide ie necessary and not to obtain opportunity to delay, it should be allowed. Trial could be proceeded with and only that part affected by the amendment may if necessary be delayed. The process of court to apply to amend pleadings cannot be abused. But objection on the ground of delay alone

is insufficient. It is to ensure that bona fide issues are dealt with and a fair and just decision is delivered at the end of a case. For that reason, the authority favour allowing the application so long as if any injustice caused thereby can be compensated with an order of costs. The grounds of decision and the notes of proceedings show that the question was not fully considered in depth.

[23] We would allow this ground of appeal.

GROUNDS 11 AND 12

[24] Grounds 11 and 12 is that the learned judge failed to take into account the provisions of the contract and also failed to take into account the delay in handing over of the keys. The reasons given by the learned judge appeared at paras 19–21 of the grounds of decision.

[25] However, in the light of our reasons above, it may be inappropriate at this point to rule upon this ground of appeal.

[26] For the foregoing reasons, we hold this is a case that requires the exercise of the appellate jurisdiction to intervene to rectify an injustice. Accordingly, we allowed the appeal and set aside the order of the High Court so that the case can be retried.

Appeal allowed with costs fixed at RM30,000.

Reported by Kohila Nesan